Supreme Court, U.S.
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No. 93-1077

In The

Supreme Court of the United States

October Term, 1993

BURL KLINE,

Petitioner,

vs.

THE ATCHISON, TOPEKA &
SANTA FE RAILWAY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Kansas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Kansas state court opinions below, holding that the Federal Employers' Liability Action plaintiff under particular factual circumstances had an affirmative duty to investigate the potential causes of his cancer, and the potential causes of action arising therefrom, commencing with the diagnosis of cancer raise any important issue of federal law.

2. Whether the Kansas state court opinions below, in their application of the discovery rule to defendant's statute of limitations defense under the unique set of facts presented in the discovery record, constitute a novel approach to Federal Employers' Liability Action law or illustrate a split in legal authorities.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent The Atchison, Topeka & Santa Fe Railway Company states that the only interested persons in this proceeding are those persons listed as parties to this proceeding and their attorneys.

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BRIEF IN OPPOSITION

The Respondent, The Atchison, Topeka & Santa Fe Railway Company, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Kansas Court of Appeals' opinion in this case.

STATEMENT OF THE CASE

The Wyandotte County, Kansas District Court, by Memorandum Decision dated September 1, 1992, granted defendant/appellee The Atchison, Topeka & Santa Fe Railway Company (hereinafter "Santa Fe") summary judgment in this Federal Employers' Liability Act action

on the ground that the applicable statute of limitations had expired before suit was filed. The Kansas Court of Appeals affirmed the entry of judgment in favor of Santa Fe in an unpublished Memorandum Decision and the Kansas Supreme Court denied further review.

In the petition for writ of certiorari, plaintiff erroneously asserts that the judicial decisions of the Kansas district court and Kansas Court of Appeals raise the question of whether plaintiff's one-time observation of a placard warning of the presence of a carcinogenic substance placed him on notice that his subsequently-diagnosed lymphatic cancer was work-related. This constitutes a misstatement of the facts presented to the courts below and of the rationales for the entry of judgment in favor of Santa Fe.

Plaintiff's misstatements of the pertinent facts are such that if certiorari were granted the "Question Presented" in the petition would not be properly before the court. Specifically, the judgment below was not premised solely or even principally on the fact that plaintiff had observed a placard warning of carcinogenic substances during his employment with Santa Fe. The record below, based on the deposition testimony of plaintiff himself, was to the effect that during his thirty-plus years of employment, plaintiff allegedly was continually exposed to a variety of highly toxic substances, including vinyl chloride, radioactive material, naptha, and weed killer sprays. (A-18, A-19). Plaintiff testified that he was exposed on a regular basis to carbon black, herbicides, potash, propane, ammonium nitrate, anhydrous ammonia and benzene. He alleged that on a daily basis he was covered head to toe with carbon black, potash, and

ammonium nitrate. Plaintiff claimed that he experienced numerous work-related illnesses during his employment, including approximately 100 occasions of severe itching of the arms following exposure to vinyl chloride, coughing up blood when he was exposed to burning diesel fuel, bad headaches when he was exposed to styrene, and swelling of the lymph glands in his neck which sometimes lasted a week or two beginning in the late 1960s or early 1970s (A-20). On numerous occasions, plaintiff asserted that he complained about working around such chemicals at safety meetings and to various supervisory employees (A-19). Plaintiff also observed on a regular basis freight cars carrying vinyl chloride which had stencils warning of the presence of known cancer causing substances. (A-18).

In the spring or summer of 1984, plaintiff was diagnosed as having a malignant cancer known as non-Hodgkin's lymphoma. At no time before 1990 did plaintiff undertake any legal or medical investigation as to possible causes of his catastrophic illness or as to possible causes of action against his employer relating to his cancer. He did not inquire of his treating physician, or anyone else, as to whether his cancer might be causally linked to his alleged on-the-job exposure to toxic chemicals. (A-20). Plaintiff did not inquire of the possibility of a causal link between his cancer and his alleged workplace exposure to toxic chemicals until after he read a June 27, 1990 Kansas City Star article which reported two studies showing an increased risk of non-Hodgkin's lymphoma in frequent users of agriculture chemicals, specifically dioxin and related compounds. (A-20). This article did

not purport to address health hazards of individuals working around toxic chemicals in a work environment.

Plaintiff did not commence his Federal Employers' Liability Action (hereinafter "FELA") until the filing of a petition in Wyandotte County, Kansas District Court on August 13, 1991, more than seven years after he contracted and was diagnosed as suffering from non-Hodgkin's lymphoma. (A-21)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

This FELA action presented a fact-specific statute of limitations defense which does not raise any important issue of federal law. The district court decision affirmed by the Kansas Court of Appeals is not in conflict with other federal circuit precedents construing the FELA statute of limitations.

II. ARGUMENT

Contrary to plaintiff's description of the history of this case, the Kansas district court and the Kansas Court of Appeals entered and affirmed judgment on behalf of Santa Fe based on the well-recognized corollary to the discovery rule which is applicable to determine the date of accrual under a statute of limitations – that a would-be plaintiff, armed with knowledge of a potential cause of his injury, has an affirmative duty to investigate the potential cause of his injury and to investigate potential

causes of action. *See United States v. Kubrick*, 444 U.S. 111, 123, 100 S.Ct. 352, 359-360, 62 L.Ed.2d 259, 270 (1979) (A plaintiff having knowledge of the facts about the harm done to him "can protect himself by seeking advice in the medical and legal community."). Armed with the critical facts about potential causes of a loss or injury, the FELA plaintiff must undertake both a medical investigation of those causes and a legal investigation of possible claims that could be asserted against his employer. *See, e.g., Fries v. Chicago & Northwestern Transportation Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990); *Albert v. Maine Cent. R. Co.*, 905 F.2d 541, 543 (1st Cir. 1990); *Kechline v. Consolidated Rail Corp.*, 800 F.2d 356, 359 (3d Cir. 1986); and *Fletcher v. Union Pacific R.R. Co.*, 621 F.2d 902, 906-907 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110, 102 S.Ct. 918, 66 L.Ed.2d 839 (1981).

In the present case, as of the spring or summer of 1984, plaintiff had knowledge of his alleged constant exposure to toxic chemicals, had allegedly sustained numerous work-related illnesses including swollen lymph glands, had allegedly complained about and expressed concern over workplace exposure to toxic chemicals, and had been diagnosed as suffering from a catastrophic illness – non-Hodgkin's lymphoma. "If there is an affirmative duty to investigate a known potential cause of an occupational disease, it is difficult to imagine a would be plaintiff possessing any more critical facts than plaintiff possessed in 1984. Surely a reasonably diligent man in plaintiff's position would have made some inquiry into the cause of his illness." (A-25; September 1, 1992 Memorandum Decision of the Wyandotte County, Kansas District Court). Yet, it is uncontroverted that plaintiff did not seek either medical or legal advice

regarding his cancer's cause or regarding potential FELA claims until more than six years after being diagnosed with non-Hodgkin's lymphoma.

The Wyandotte County, Kansas District Court and Kansas Court of Appeals decisions did not turn on a split in legal authorities, as plaintiff has contended in his petition for writ of certiorari. What both of these courts concluded was that the plaintiff's act of failing to undertake any medical or legal inquiry for more than six years after contracting cancer constituted an abdication of his affirmative duty to investigate potential causes of his injury. Both trial court and appellate court concluded that the plaintiff, even when his conduct was construed in the light of the objective person standard, could not sit on his rights or potential rights for over six years and then revive a stale FELA claim by relying on his alleged reading of a newspaper article that was published in June 1990 as an alternative date of accrual. There was nothing in that newspaper article which armed plaintiff with knowledge of any more critical facts than he had possessed in 1984 – knowledge of alleged workplace exposure to toxic chemicals, knowledge of potentially harmful effects of that exposure, knowledge of previous work-related illnesses, and knowledge of his cancer. Both courts concluded that the affirmative duty to investigate potential causes of his cancer arose in 1984, and not in 1990 with the reading of a newspaper article. Plaintiff's suggested tolling rule would have entirely vitiated a would-be FELA plaintiff's affirmative duty to investigate and would have extended the FELA three year limitations statute, 45 U.S.C. § 56, indefinitely, that is, until a plaintiff happened to read something in the local newspaper that

triggered an interest in a potential FELA claim. In the present case, presumably had plaintiff never read the Kansas City Star article of June 1990, plaintiff would be arguing that his FELA cause of action had not yet accrued, or had accrued only when his attorney happened to retain an expert medical witness. Such uncertainty and subjective assessment of "accrual" would defeat the essential purposes of the FELA statute of limitations – repose and the prevention of stale claims.

Plaintiff argues that there is an inconsistency in FELA precedents regarding application of the "discovery rule." Plaintiff complains of a lack of "sufficient uniformity." However, the determination of when a cause of action accrues for statute of limitations purposes inherently is a fact-specific inquiry which is not amenable to a single bright line test. Particular FELA limitations cases are resolved based on the particular facts presented. Just because the "discovery rule" is an objective standard does not mean that every FELA statute of limitations defense raises a jury question. In the first instance, the trial court must determine whether plaintiff has made a case, based on the factual record presented, that accrual occurred less than three years after suit was filed. In the present case, the factual record did not support such a conclusion based on the knowledge of "critical facts" that plaintiff claimed to have as of 1984. The only knowledge that plaintiff claimed to have obtained in 1990 was that agricultural workers exposed to dioxin have a higher incidence of non-Hodgkins' lymphoma. Other than plaintiff's own inaction, there was no reason that an investigation of the causes of plaintiff's cancer and of the existence of potential FELA claims could not have commenced in

1984. There was nothing in the record suggesting that plaintiff could not have obtained the same "expert opinions" about causation from Melvin D. Rueber (A-20) in 1984 that he ultimately obtained after suit was filed seven years later.

In sum, the present case does not present this court with any opportunity to reevaluate the parameters and requirements of the "discovery rule" or to resolve any conflict of authorities regarding the FELA limitations statute. The decisions below turn on the very specific facts presented in plaintiff's deposition and this court does not sit to second-guess or reevaluate factual determinations. No important issue of federal law is raised here. Indeed, the Kansas Court of Appeals did not choose to publish its decision, so that its Memorandum Opinion is not even a precedent in the state of Kansas. The "Question Presented" in the petition for writ of certiorari was not an issue presented to, or decided by, the Kansas courts below. Finally, the decisions below are supported by the FELA precedents cited therein and constitute a particular application of the "discovery rule" to a unique set of facts.

CONCLUSION

For the reasons stated therein, certiorari should be denied.

Respectfully submitted,

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